APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. 934

HUGH BRYSON, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR CERTIORARI FILED JANUARY 13, 1969
CERTIORARI GRANTED FEBRUARY 24, 1969

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DOCKET ENTRIES

(1) United States District Court for the Northern District of California

May 24, 1967, Motion for Writ of Error Coram Nobis to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for Other Requested Relief filed.

(2) United States District Court for the Northern District of California

July 31, 1967, Order after hearing on Motion for Writ of Coram Nobis, briefs to be filed 15-15 days, case continued to August 31, 1967 for submission (Judge Zirpoli).

(3) United States District Court for the Northern District of California

August 31, 1967, Order made—submitted.

(4) United States District Court for the Northern District of California

November 6, 1967, Order filed that Petitioner's Conviction and Sentence Be and Hereby Are Set Aside; Further Ordered He Be Released from Parole and Its Attendant Terms and Conditions and He Be Relieved of Remaining Portion of his Fine (Judge Zirpoli).

(5) United States District Court for the Northern District of California

December 4, 1967, Notice of Appeal by Respondent, United States of America filed.

(Briefs in the United States District Court and Court of Appeals omitted)

In the United States District Court for the Northern District of California

No. 34105 Criminal

United States of America, Plaintiff,

vs.

Hugh Bryson, Defendant.

MOTION FOR WRIT OF ERROR CORAM NOBIS TO VACATE, SET ASIDE AND CORRECT JUDGMENT OF CONVICTION AND SENTENCE OF IMPRISONMENT AND FINE, AND FOR OTHER REQUESTED RELIEF

Hugh Bryson, the defendant named above, hereby moves the Court for its judgment and order, vacating, setting aside and correcting the judgment of conviction rendered herein, and the imposition of sentence and fine imposed herein, and for grounds for the within motion, alleges as follows:

I

The indictment herein originally charged, in three counts, that the defendant had violated 18 USC 1001 in that he had filed with the National Labor Relations Board an Affidavit of Non-Communist Union Officer, in which the defendant allegedly made three false statements, to-wit: falsely stating that he was not

a member of the Communist Party; falsely stating that he was not affiliated with the Communist Party; and falsely stating that he did not support an organization that believed in or taught the overthrow of the United States Government by force. Prior to the trial on said indictment, the Government of its own motion moved to dismiss the third count, to-wit, the alleged false statement relating to "support" of a proscribed organization.

II

The defendant was tried before a jury and a Judge of this Court, and upon the conclusion thereof, the jury rendered a verdict acquitting the defendant of the charge of falsely denying membership in the Communist Party; and convicting defendant of the charge of falsely denying "affiliation" with the Communist Party.

The trial court thereupon entered judgment of conviction on the said count of "affiliation", and imposed on the defendant the maximum sentence permitted by law: a term of five years in a federal penitentiary, and a fine of $10,000, the said fine being designated as a committed fine.

III

The defendant took an appeal, alleging, among other things, the unconstitutionality of Section 9(h) of the Labor Management Relations Act of 1947 (29 USCA 159[h]), the section which provided for the filing of the affidavit in question. Assertions of the

unconstitutionality of the section had been made in the trial court, and had been rejected.

The Court of Appeals affirmed (238 F.2d 657). On petition for rehearing, the Court of Appeals denied the petition (243 F.2d 837).

The constitutional objections raised by the defendant against Section 9(h) were rejected on the basis of the decision of the Supreme Court in *American Communications Assn. v. Douds*, 339 U.S. 382 (See 238 F.2d at 659, fn. 1; 243 F.2d at 839, fn. 2, and 840).

IV

A petition for writ of certiorari to the Supreme Court was filed, and was denied (355 U.S. 817).

V

The defendant thereupon filed with the trial court a motion under Rule 35 of the Federal Rules of Criminal Procedure, 18 USC, seeking to reduce the sentence. The motion was denied.

An appeal from the order of the Court denying said motion under Rule 35 was taken to the Court of Appeals, and denied (265 F.2d 9).

A petition for writ of certiorari to the Supreme Court was filed, and denied (360 U.S. 919).

VI

The defendant surrendered to the United States Marshal and commenced the five-year term of imprisonment in the month of January 1958, and was

transported to and confined at the penitentiary at Terminal Island continuously until December 1959, when he was released on parole. The five-year period of his sentence, including the portion consisting of imprisonment and the period of parole thereafter, would ordinarily have expired in January 1963. However, by virtue of the imposition of the $10,000 committed fine, the said period of parole continued in effect pending full and final payment of said fine.

The defendant has been unable to pay, and has not paid, the said fine of $10,000, save and except for payments heretofore made totaling the sum of $2,000, leaving a balance due and unpaid in the sum of $8,000 of said fine.

VII

By reason of the defendant's inability and failure to discharge in full the balance owed pursuant to said fine, the defendant remains under the supervision of Albert Wahl, Chief Probation Officer of this Court; is required to make monthly reports to the said probation officer; cannot travel outside the State of California without first securing permission from the Probation Office; and is subject at all times to the supervisory parole powers of said Probation Office.

Additionally, the effect of said judgment of conviction has been to deprive the defendant, and he is presently deprived, of the right to exercise the franchise of voting, and of the right to secure a passport.

The defendant is informed and believes and therefore alleges that until such time as the remaining $8,000 due under said fine has been paid, he will continue to be under the said restraints and disabilities.

VIII

This Court has jurisdiction to entertain a motion and grant relief thereon, under the provisions of 28 USC § 1651(a) [the so-called "All-Writs" Section of the Judicial Code], which invests the federal courts with power to make corrective orders based upon the existence of facts that affect the validity and regularity of the judgment of conviction (*United States v. Morgan,* 346 U.S. 502 [1953]). The relief may be sought regardless of the fact that the person seeking it has served the term of imprisonment imposed upon him (*United States v. Morgan, supra,* at 512-3), and especially if it is claimed that the "conviction was invalid" (ibid.).

IX

The defendant alleges that the judgment of conviction rendered against him was without jurisdiction, and/or that the sentence imposed was not authorized by law and is not otherwise presently open to collateral attack, and/or that there has been such a denial or infringement of his constitutional rights as to render the judgment of conviction vulnerable to the attack of this motion.

The defendant further alleges that this Court was without jurisdiction to impose such sentence, and/or

that the sentence imposed was not authorized by law and that it is not otherwise presently open to collateral attack, and/or that it was illegally pronounced, and/or that it was and is illegal.

In support of the foregoing allegations, the defendant cites the following facts.

X

The provision of law which required the filing of the non-communist affidavit (Section 9(h)), National Labor Relations Act as amended by the Labor Management Relations Act of 1947; 29 USCA 159[h]), was repealed by the Congress in 1959, and as a substitute therefor the Congress adopted 29 USC 504, making it a criminally punishable offense for a member of the Communist Party to serve in any of an enumerated list of leadership positions in a labor union.

An indictment was returned in this District in 1961 against one Archie Brown charging a violation of 29 USC 504, in that Brown knowingly served as a union officer while a member of the Communist Party (Crim. No. 37934). After trial by jury, Brown was convicted and sentenced to six months' imprisonment. On appeal, the original 3-Judge panel, *sua sponte,* ordered the case set for re-argument before the Court *en banc.* The conviction was reversed, the members of the Court of Appeals dividing as follows: Judge Merrill, in an opinion in which he was joined by Judges Jertberg, Koelsch, Browning and Duniway, held Section 504 to be violative of Brown's First and

Fifth Amendment rights, and ordered the conviction reversed and the indictment dismissed; Judge Hamley, without reaching the same constitutional questions, wrote that he would reverse and remand for a new trial on the ground that an erroneous instruction of the trial court served to violate Brown's Sixth Amendment rights; and Judges Chambers and Barnes dissented, voting to affirm the conviction (334 F.2d 488). The United States petitioned for certiorari, and certiorari was granted (379 U.S. 899).

XI

The brief of the United States argued that Section 504 was controlled by the principles enunciated in *American Communications Assn. v. Douds,* 339 U.S. 382, and by reason thereof, the Court of Appeals was in error in holding the section unconstitutional under the First and Fifth Amendments (see 14 L.Ed. 2d 984).

The brief for Brown attacked Section 504 as violative of First and Fifth Amendment rights, and also on the ground that it violated Article I, section 9, Clause 3 as both a bill of attainder and an ex post facto law (see 14 L.Ed.2d 985).

The Supreme Court, in an opinion written by the Chief Justice, held that Section 504 was unconstitutional as a bill of attainder, thereby violating Article I, Section 9, Clause 3 of the Constitution (381 U.S. 437). The opinion noted that Section 504 "was designed to accomplish the same purpose as § 9(h), but in a more direct and effective way" (381 U.S.

437, at 439, fn. 2). It disapproved of the holding in *American Communications Assn. v. Douds,* supra, that Section 9(h) was not a bill of attainder, in the following words:

> "The Solicitor General argues that § 504 is not a bill of attainder because the prohibition it imposes does not constitute 'punishment.' In support of this conclusion, he urges that the statute was enacted for preventive rather than retributive reasons—that its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events. He relies on American Communications Assn. v. Douds, 339 US 382, 94 L ed 925, 70 S Ct 674, which upheld § 9(h) of the National Labor Relations Act, the predecessor of the statute presently before us. In Douds the Court distinguished Cummings, Garland and Lovett on the ground that in those cases 'the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct.' Id., at 413, 94 L ed at 952. [381 U.S. at 456-7]
>
> * * * * *
>
> "We think that the Court in Douds misread United States v. Lovett when it suggested, 339 US, at 413, 94 L ed at 952, that that case would be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons. In Lovett the Court, after reviewing the legislative history of § 304 of the Urgent De-

ficiency Appropriation Act, 328 US, at 308-313, 90 L ed at 1255-1258, concluded that the statute was the product of a congressional drive to oust from government persons whose (congressionally determined) 'subversive' tendencies made their continued employment dangerous to the national welfare: 'the purpose of all who sponsored § 304 . . . clearly was to "purge" the then existing and all future lists of government employees of those whom Congress deemed guilty of "subversive activities" and therefore "unfit" to hold a federal job.' Id., at 314, 90 L ed at 1258. Similarly, the purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill positions which might affect interstate commerce." (381 U.S. at 460)

The dissenting opinion of Mr. Justice White, in which Justices Clark, Harlan and Stewart joined, recognized that the majority opinion had the legal effect of overruling the holding in *American Communications Assn. v. Douds,* that Section 9(h) was not an unconstitutional bill of attainder. This recognition is stated as follows.

> "It is not difficult to find some of the cases and statutes which the necessary implications of the Court's approach will overrule or invalidate.
>
> American Communications Assn. v. Douds, 339 US 382, 94 L ed 925, 70 S Ct 674, which upheld the predecessor statute to § 504 is obviously overruled. In that case the Court accepted the congressional findings about the Communist Party and about the propensity of Party members 'to

subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government.' 339 US, at 388, 94 L ed at 938. Moreover, Congress was permitted to infer from a person's 'political affiliations and beliefs' that such a person would be likely to instigate political strikes. 389 US, at 391-392, 94 L ed 939, 940. Like § 504, the statute there under consideration did not cover all persons who might be likely to call political strikes. Nevertheless, legislative findings that *some* Communists would engage in illegal activities were sufficient to sustain the exercise of legislative power. The Bill of Attainder Clause now forbids Congress to do precisely what was validated in Douds. (381 U.S. at 464-5)"

XII

By virtue of the foregoing, the present state of facts is this:

1. The section of law, to-wit, 9(h), whose constitutional validity under the bill of attainder provisions of the Constitution was an indispensable requisite to the legality of the conviction and sentencing of the defendant, was replaced by Section 504.

2. The Supreme Court has found and determined that Section 504 is unconstitutional as being violative of the bill of attainder provisions of the Constitution.

3. The United States contended in *Brown v. United States, supra,* that both sections of law, 9(h) and 504, were governed by the same constitutional principles, and argued that the upholding of 9(h)

in *American Communications Assn. v. Douds* constituted binding precedent to uphold Section 504.

4. The contentions advanced for Brown included the claim that both 504 and 9(h) were unconstitutional bills of attainder, and expressly requested the Court to overrule the decision in *American Communications Assn. v. Douds* (Brief of Respondent on Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, pp. 65-69).

5. The majority opinion in *Brown v. United States* disapproved the attempt in *American Communications Assn. v. Douds* to distinguish earlier decisions holding similar legislation to constitute an unconstitutional bill of attainder; and the minority opinion expressly recognized that the majority decision constituted an obvious overruling of *American Communications Assn. v. Douds.*

6. It follows, therefore, that the judgment of conviction against the defendant was rendered without jurisdiction, that the Court was without jurisdiction to impose the sentence which it did impose, that said sentence was imposed in violation of the Constitution of the United States, that the sentence was not authorized by law, was illegal, and was illegally imposed, and that there has been such a denial and infringement of constitutional rights of the defendant as to render the judgment against him and the sentence imposed against him vulnerable to this motion.

Additionally, upon the facts set forth above, the defendant alleges that the continued applicability to him of the said judgment and sentence would consti-

tute excessive punishment in light of all the facts and circumstances presented by the record herein, and by reason of the events aforesaid occurring after defendant's conviction relating to the course of litigation over Sections 9(h) and 504, the substantial effect of which justifies the application of the principle that where the interests of justice would make unfair any other course, the motion for extraordinary relief should be granted.

The relief here sought includes, but is not limited to, such relief as the Court might conceivably grant under 28 USCA § 2255 to a person qualifying as a "prisoner in custody under sentence" by reason of the continuance of a parole status, although the prisoner has been released from penitentiary confinement (see *Hoptowit v. United States*, 274 F.2d 936 [CCA 9, 1960]; *Matysek v. United States*, 339 F.2d 389 [CCA 9, 1964]; *Tucker v. United States*, 235 F.2d 238 [CCA 9, 1956]; *Kyle v. United States*, 263 F.2d 657 [CCA 9, 1959]; *Woykovsky v. United States*, 309 F.2d 381 [CCA 9, 1962]; *Lopez v. United States*, 217 F.2d 526 [CCA 9, 1955]).

Wherefore, the defendant prays that notice of this motion shall be caused to be served upon the United States Attorney, that a prompt hearing be had upon the said motion, that the issues raised herein be determined and that findings of fact and conclusions of law with respect thereto be made, and that this Court shall make its order vacating and setting aside the judgment herein, and vacating, setting aside and correcting the sentence herein, and discharging the

defendant from the restraints of any further parole or requirement to pay any remaining portion of the fine imposed on him, and ordering the United States to return and reimburse the defendant for such amounts of money as the United States has received from him in payment of the aforesaid fine, and to grant such other and further relief as may be meet, just, proper and necessary in the premises to effect justice.

Gladstein, Andersen, Leonard & Sibbett
By Richard Gladstein
Attorneys for Defendant.

(Jurat omitted in printing.)

Filed May 24, 1967,
Clerk, U.S. District Court,
San Francisco.

[Title of Court and Cause]

GOVERNMENT'S RESPONSE IN OPPOSITION TO MOTION FOR WRIT OF ERROR CORAM NOBIS AND OTHER RELIEF

Hugh Bryson has filed a document styled "Motion for Writ of Error Coram Nobis to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for Other Requested Relief." The substance of his request is that the court now vacate and set aside the judgment of conviction rendered against him on June 14, 1965, [sic] charging that he falsely denied affiliation with the Communist Party in an affidavit filed pursuant to Section 9(h) of the Labor Management Relations Act of 1947 (29 U.S.C.A., Section 159(h)). For this perfidy he had been prosecuted under Section 1001 of Title 18 United States Code. The court, Honorable William G. Mathes, Judge, sentenced him to serve a term of five years imprisonment and imposed a $10,000 fine. The judgment and sentence upon the conviction were affirmed (*Bryson v. U.S.*, 1956, 9 Cir. 238 F. 2d 657). Petition for Rehearing was denied. 243 F. 2d 837, 1957. Certiorari was denied June 22, 1959, 360 U.S. 929, 79 S.Ct. 1437.

Bryson commenced service of his five year term in January 1958 and was released on parole in December 1959. He has been out of confinement since 1959. His term expired not later than 1963.

I. BRYSON'S CONTENTIONS

Bryson seeks to overturn his conviction, set aside judgment of imprisonment and fine on the grounds that ten years later, on June 7, 1965, the decision

in *U.S. v. Archie Brown* (381 U.S. 437; 85 S.Ct. 1707), decided by five to four, held that Section 504 of the amended Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C.A. 504), which succeeded Section 9(h), constituted a Bill of Attainder in violation of Article I, Section 9, Clause 3 of the Constitution of the United States. He reasons that if the successor statute to Section 9(h) was invalid, Section 9(h) must also had [sic] been invalid. Moving from this deduction, he asserts that his 1955 conviction should be viewed as to constitutionality and efficacy in the light of the wisdom shed by the rule in *Archie Brown's* case. Thus viewed, he says, he ought to be relieved from completing payment on the $10,000 fine which was assessed against him. It is to acquire this latter pecuniary benefit that he initiates this action.

II. THE GOVERNMENT'S POSITION

The United States takes the following positions:

(1) This is not a proper case for application of the writ of Error Coram Nobis; Bryson's complaint is cognizable, if at all, solely under the provisions of title 28 U.S.C., Section 2255; and therefore the motion should be addressed to the trial judge, Honorable William G. Mathes.

(2) The motion is without merit and should be dismissed.

III. THE STATUTES INVOLVED

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act

of 1947 (61 Stat. 146; P.L. Ch. 120, June 23, 1947) withheld the procedures of the National Labor Relations Board from invocation by any labor organization unless there had been filed by each union official involved an affidavit stating that that affiant was not a member of the Communist Party or affiliated with such party. Specifically it read:

> "(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

In 1959 Congress passed the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 536, 29 U.S.C. Section 504) making it a crime for a member of the Communist Party to serve as an officer of a

labor union. The precise wording of the pertinent portion of that act was:

> Section 504. *Prohibition against certain persons holding office; violations and penalties*
>
> (a) No person who is or has been a member of the Communist Party * * * shall serve—
>
> (1) As an officer, director, trustee, member of any executive board or similar governing body, * * * of any labor organization, or
>
> * * * * *
>
> during or for five years after the termination of his membership in the Communist Party, * * *.
>
> * * *
>
> (b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> * * * * *

IV. ARGUMENT

A. *This is not a proper case for the Writ of Error Coram Nobis—Bryson's complaint is cognizable, if at all, solely under the provisions of Title 28 U.S.C., Section 2255.*

1. *The Writ of Error Coram Nobis*

Literally translated, the Latin words become "before" or "in the presence of" [coram] and "ourselves" [nobis]. This writ was designed to correct errors of fact in the court in which the judgment was rendered. As Justice Reed observed in *U.S. v. Morgan*, 346 U.S.

502, 504 et seq., it is concerned with correcting errors of "fundamental character" where they were not apparent on the face of the record. The *Morgan* case itself involved a claim of deprivation of right to counsel—obviously a factual matter.

Bryson does not allege the existence of a latent set of facts consideration of which would set his case in a different legal posture. He claims instead adherence to a belated view of the law. This is not the proper use of the writ of Error Coram Nobis.

2. *Title 28 U.S.C. Section 2255*

The statute reads in pertinent part:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

Bryson calls his motion Coram Nobis but has really framed and now argues it as the only kind of animal it could really be—if it could claim existence. This is a motion under Section 2255.

He has cited *Morgan* (supra) in defense of the Latin version, but he does not bring his case within that decision. Morgan, like Bryson, had already served

a term under a federal conviction and had been released from prison. But, unlike Bryson, Morgan had suffered a subsequent conviction in the state court for which he was again in custody. His state court term was aggravated by reason of the existence of the federal "prior" which Morgan complained had been foisted upon him without giving him adequate constitutionally required right to counsel. Morgan could not invoke Section 2255 because he was not in federal custody. But the Supreme Court reasoned that the length of his custody did depend in part on the support it received from the continued effect of the federal conviction. Therefore, Morgan was entitled to some relief. He couldn't use habeas corpus because he wasn't ready for release. What he needed was some action which would remove the federal fibers from the state court strait-jacket he was wearing. They said coram nobis was appropriate for this purpose since the genesis of his troubles lay in the factual issue of counsel.

But Bryson, on the other hand is claiming that his 1955 sentence "was imposed in violation of the Constitution of the United States"—the very ground for which Section 2255 was intended. Only, Bryson is not in custody. He has finished his time and his term. He is under no restraint. He simply owes the government $8000 yet on his fine and he does not want to pay it. This is understandable, but entitles him to no relief.

Bryson suggests that since the fine imposed was a "committed" fine, he is still in some sort of custody. We do not agree. He certainly does not stand com-

mitted. Nor is he held awaiting the outcome of an application for discharge as a "poor convict" under Title 18 U.S.C., Section 3569.

Parenthetically, we suggest consideration of the following comment made by the court in *In re Greenwald,* 77 Fed. 590, 594 (Circuit Court, N.D. Calif.) in relation to the effect of Section 1042 of the Revised Statutes, the predecessor of Section 3569:

> "There is nothing, however, in the foregoing provisions to indicate that any imprisonment to enforce the payment of a fine imposed may be extended beyond the maximum term of imprisonment fixed by Congress in punishment of the particular offense denounced, * * *"

3. *This motion should be referred to the Trial Judge*

It is the practice in this court to refer motions under 2255 to the trial judge—if of course he is available. Judge Mathes who tried this case is, we are informed, available and the matter should (although it is not mandatory) be referred to him. We so move.

B. *The Validity of the Conviction in Bryson's Case is not Affected by the Decision in Brown v. U.S.*

In 1950, Section 9(h) had been held constitutional in *American Communications Association etc. v. Douds,* 339 U.S. 382, 70 S.Ct. 674. As set forth above, 9(h) had required the filing of a so-called "non-communist affidavit as a prerequisite to utilizing the provisions of the National Labor Relations Act. In 1959, Congress changed this procedure and enacted a flat

prohibition against holding membership in a labor union by one who was also member of the Communist Party. A majority of the Supreme Court held that this latter crime was also a Bill of Attainder and therefore unconstitutional. Perhaps the same majority might have held 9(h) invalid (although it certainly could not have been a Bill of Attainder since it worked no "corruption of blood" or any of the other pains and penalties which historically led to the prohibition in our constitution against bills of attainder.) But the majority in the *Brown* decision did not overrule *Douds* either expressly or impliedly. It is only a statement in the dissenting opinion of Mr. Justice White which contends that *Douds* is "obviously overruled." There was no necessity for the *Brown* court to overrule *Douds* because the statutes involved bore little similarity to each other.

In any event, conceding arguendo that *Douds* was overruled by *Brown,* such a conclusion would not affect the validity of Brown's conviction, as a conviction which is obtained and upheld by one interpretation of the constitution is not affected by a subsequent change in that interpretation.

An easy parallel is found in the situation where a criminal statute is repealed or expires. It is well settled law that such repeal has no effect on the convictions of individuals who have had final judgments entered against them prior to the statute's repeal. *Welch v. Hudspeth,* 132 F. 2d 434; *U.S. ex rel Randall v. U.S. Marshal for the E.D. of N.Y.,* 143 F. 2d 830; *Oderkirk v. Ryan,* 85 F. 2d 313. We have gone

through much re-learning of this in the aftermath of *Escobedo, Miranda,* et al.

An apt case in point was *Gaitan v. U.S.,* 317 F. 2d 494, 10 Cir., 1963, where the defendant had been convicted of possession of marihuana illegally seized from his premises by local police officers. They turned the contraband over to federal authorities who used it to prosecute Gaitan in federal court under the "silver platter" doctrine. But thereafter, the Supreme Court decided *Elkins v. U.S.,* 364 U.S. 206, *Rios v. U.S.,* 364 U.S. 253, and *Mapp v. Ohio,* 367 U.S. 643, in which it overturned the Silver Platter doctrine. Inspired by this fortunate turn of events Gaitan brought a motion under 2255. The trial court refused relief and its judgment was affirmed by the Tenth Circuit (295 F. 2d 277) holding that the question of admissibility of evidence was now res judicata. Certiorari was denied, 369 U.S. 857; 82 S.Ct. 939. He then brought a second action under 2255. The Tenth Circuit citing *Patterson v. Colorado,* 205 U.S. 454, 21 S.Ct. 556, quoted Mr. Justice Holmes as follows:

> "* * * But in general the decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the Fourteenth Amendment merely because it is wrong or because earlier decisions are reversed."

The Tenth Circuit also observed (317 F. 2d at 498) that "A change in constitutional interpretation does not justify or require a different result than that pertaining to a change in the Constitution itself.

* * *" It is noted that the judgment against Gaitan had become final, and it said that "If Habeas Corpus [Section 2255] can be used to overthrow that judgment, 'the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed.'"

In the recent decision of *Johnson and Cassidy v. State of New Jersey,* 384 U.S. 719, the Supreme Court declined to apply the *Miranda* rule retroactively stating that retroactive application to a constitutional interpretation was justified only when the rule affected "the very integrity of the fact-finding process" and averted "the clear danger of convicting the innocent." *Linkletter v. Walker,* 381 U.S. 618, 639; *Teahan v. Shott,* 382 U.S. 406, 416. Certainly, such is not the case here.

Thus, under the law controlling at the time of Brown's conviction and appeal, the court had full jurisdiction to render a judgment of conviction and impose a sentence and fine. There has been no subsequent decision regarding the constitutional interpretation of a different statute because the court has invalidated Section 9(h) which was superseded.

Finally, it must be clear that whether or not Section 9(h) was or was not invalidated by the *Brown* decision is quite irrelevant. Bryson was not convicted of violation of 9(h)—which was not the basis of his trouble. He was convicted of making a false statement contrary to the provisions of Section 1001 of Title 18, which provides:

Section 1001. *Statements or entries generally*

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

It is not contended that Section 1001 has been overturned by the ruling that Section 504 of the Landrum-Griffin Act was a Bill of Attainder. The trial court had jurisdiction under the statute that then existed and that jurisdiction is not to be retroactively divested by showing that we now have a different constitutional regard for an entirely different statute.

Conclusion

It is clear that the motion called Coram Nobis is in reality an inherently defective application under Section 2255; that by whatever name it is styled, it is without merit and should be denied.

Respectfully, it is so submitted.

Cecil F. Poole,
United States Attorney
Attorney for Plaintiff

United States District Court
for the Northern District of California

No. 47,127

Hugh Bryson,
Petitioner,
vs.
United States of America,
Respondent.

ORDER SETTING ASIDE CONVICTION AND SENTENCE

Petitioner, Hugh Bryson, moves to vacate and set aside what remains of his sentence for perjury. He makes his motions under 28 U.S.C. §§ 1651(a) and 2255 (1964). This court has heard oral argument from each party.

Bryson was tried for violating 18 U.S.C. § 1001 (1964), the general federal perjury statute. After seeking legal advice, Bryson had completed the non-communist affidavit then required by § 9(h) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 159, a section which required affidavits of union officers before the union could use the facilities and services of the National Labor Relations Board. Bryson was convicted of falsely swearing that he was not "affiliated" with the Communist Party. At the trial, he unsuccessfully challenged the oath requirement as

being unconstitutional and was sentenced to five years in prison and was fined $10,000, the maximum sentence provided for by § 1001.

The conviction was affirmed on appeal, *Bryson v. United States*, 238 F. 2d 657 (9th Cir. 1956), *rehearing denied*, 243 F. 2d 837 (9th Cir. 1957), *cert. denied*, 355 U.S. 817 (1957). Bryson subsequently moved to have his sentence reduced in accordance with Fed. R. Crim. P. 35. The motion was denied and an appeal dismissed, *Bryson v. United States*, 265 F. 2d 9 (9th Cir. 1959), *cert. denied*, 360 U.S. 919 (1959).

Petitioner is presently on parole and a substantial part of his fine ($8,000) remains unpaid. Consequently, his parolee status continues with its attendant restrictions on his personal freedom. He must make monthly reports and must seek permission to travel outside the state. He is unable to vote.

Petitioner argues: (1) Section 9(h) was unconstitutional at the time of his trial and therefore the trial court lacked jurisdiction to try him or to impose any punishment, and therefore his sentence should be set aside; (2) the sentence imposed was too severe and should be reduced; (3) the doctrine of "abatement" is applicable and his conviction should be set aside.

Respondent contends: (1) this court lacks jurisdiction to consider the merits of petitioner's claims because he is not in "custody" within the meaning of 28 U.S.C. § 2255 (1964); (2) the motion is without merit; (3) petitioner lacks standing.

The issues, then, are six: (1) is petitioner's status as a parolee, with a partially unpaid fine owing, suffi-

cient to confer jurisdiction upon this court? (2) is "abatement" applicable to the facts of this case? (3) was the sentence too severe and may it now be reduced? (4) does petitioner have standing to allege the unconstitutionality of § 9(h)? (5) if so, was § 9(h) unconstitutional? (6) if so, should the relief prayed for be granted?

(1) *Jurisdiction*

Petitioner contends that his motion is authorized by either 28 U.S.C. § 1651(a) (the "All Writs" statute), as being for relief in the nature of a writ of error *coram nobis,* or 28 U.S.C. § 2255, the statutory motion available to prisoners in federal custody in lieu of the writ of habeas corpus.

Section 2255 has, as a prerequisite to its use, the requirement that the petitioner be in custody. The identical requirement is imposed upon state prisoners seeking relief via the federal writ of habeas corpus, 28 U.S.C. § 2241. The two sections, 2241 and 2255, have been similarly construed, and this court holds that custody means the same in each. *United States v. Hayman,* 342 U.S. 205 (1952) (construing § 2255 to be as broad as § 2241 to avoid the constitutional question of whether § 2255 would otherwise be an unconstitutional suspension of the writ of habeas corpus); *Matysek v. United States,* 339 F. 2d 389, 394 (9th Cir. 1964); *Cf., Sanders v. United States,* 371 U.S. 1 (1963); *Parker v. Ellis,* 362 U.S. 574, 575, n. 1 (1960).

The government's contention that petitioner's status —a parolee with a partially unpaid fine owing—is not

tantamount to custody is without merit. The court finds that petitioner is in custody within the meaning of § 2255. *E.g., Jones v. Cunningham,* 371 U.S. 236 (1963) (interpreting § 2241); *Hoptowit v. United States,* 274 F. 2d 936 (9th Cir. 1960) (interpreting § 2255); *United States v. DeMario,* 246 F. Supp. 786 (E.D. Mich. 1965) (interpreting § 2255). It has been suggested that the *Jones* case is not dispositive of all parole cases because the terms and conditions may vary from case to case, and therefore that each situation must be considered independently. 51 *Calif. L. Rev.* 228, 231 (1963). The restraints on Bryson's liberty to do and go as he pleases are similar to those in *Jones,* and Bryson's duty to report monthly and duty to secure permission to travel outside the state constitute restraint sufficient to amount to custody.

Alternatively, the court holds that even if Bryson is not in custody, it may consider petitioner's motion as one for relief in the nature of error *coram nobis,* 28 U.S.C. § 1651(a). In *United States v. Morgan,* 346 U.S. 502, 505 (1954), the Supreme Court said, "federal courts should act in doing justice if the record makes plain a right to relief. . . . We therefore treat the record as adequately presenting a motion in the nature of a writ of error *coram nobis* enabling the trial court to properly exercise its jurisdiction." And at 511, "We do not think that the enactment of § 2255 is a bar to this motion. . . ." Even if custody is lacking, a motion purportedly made under § 2255 may be treated as an application for a writ of error *coram nobis. E.g., United States v. Morgan,* 346 U.S. 502

(1954) (federal sentence already fully served at time of motion); *Migdol v. United States,* 298 F. 2d 513 (9th Cir. 1961); *Shelton v. United States,* 242 F. 2d 101 (5th Cir. 1957); *United States v. DeMario,* 246 F. Supp. 786 (E.D. Mich. 1965). The relief sought may be dispensed whether the motion is treated as being under § 2255 or § 1651(a). Harvey, *28 U.S.C. 2255: From Habeas Corpus to Coram Nobis,* 1 *Washburn LJ.* 381, 388 (1961).

The mere facts that petitioner has already appealed and that the constitutionality of § 9(h) could be raised on appeal are not dispositive of his right to press his claims in this court now. Though it is well established that § 2255 is no substitute for an appeal, the Supreme Court has recognized limited exceptional circumstances which justify the motions now made before this court. In *Sunal v. Large,* 332 U.S. 174 (1947), the Court discussed the exceptional circumstances. One is when the law has changed after the time to appeal has elapsed. 322 U.S. at 178-79, 181, 182; see also *Thornton v. United States,* 368 F. 2d 822, 825-26 (D.C. Cir. 1966). The fact that Bryson appealed should not be used to distinguish *Sunal,* for that would merely punish the astute petitioner who foresees a decisional trend. The Court in *Sunal* also stressed the difference between mere procedural or evidentiary errors and those involving constitutional rights and the basic jurisdiction of the trial court. *Cf., Fay v. Noia,* 372 U.S. 391, 424 n. 35 (1963).

The only argument mounted against the proposition that a "second chance" should be given petitioner in

light of new decisions is that litigation must end sometime even if a law is later construed differently. Hundreds of cases may have to be relitigated under new procedures. See *United States v. Sobell,* 314 F. 2d 314, 322 n. 6, 322-23 (2d Cir. 1963); see generally Bator, *Finality in Criminal Law and Federal Habeas Corpus . . . ,* 76 *Harv. L. Rev.* 441 (1963). But that policy is inapplicable to the case of Hugh Bryson for two reasons: First, no threat of mass relitigation exists, for § 9(h) has long ago been repealed and most sentences under § 1001 have been fully served; and second, petitioner contends that no new trial under new procedures will be necessary, but rather a decision in his favor on the merits will bar any further litigation.

Though the decisions are admittedly in conflict as to the use of collateral attack on facts such as those present here, the considerations outlined above mitigate in favor of allowing petitioner to proceed by way of collateral attack. See Bator, *Finality in Criminal Law and Federal Habeas Corpus . . . ,* 76 *Harv. L. Rev.* 441, 527 n. 220 (1963), suggesting that "an acceptable accommodation [would be] by according the district judge a large discretion to determine whether justice in the individual case would be served . . . ."

(2) *Abatement*

Petitioner contends, "The combination of repeal of Section 9(h), followed by the adoption of Section 504 [29 U.S.C. § 504] as a successor, followed thereafter by the Supreme Court's holding [*United States v.*

Brown, 381 U.S. 437 (1965)] that § 504 was an unconstitutional bill of attainder, creates the foundation for invoking the doctrine of abatement." Brief for Petitioner, p. 13. The court holds otherwise.

Petitioner relies primarily upon *Hamm v. City of Rock Hill,* 379 U.S. 306 (1964), which held that the Civil Rights Act of 1964 had the effect of abating state sit-in convictions then on appeal, the Act having made the formerly illegal conduct lawful. But even the majority in *Hamm,* while stating that no express congressional intent is necessary to abate prior convictions, did find it necessary at least to impute to Congress an intention to abate the convictions by passage of the comprehensive scheme of legislation which was the Civil Rights Act of 1964. 379 U.S. at 313.

Section 9(h) required that before a union could avail itself of the services of the National Labor Relations Board, the officers of the union had to file the so-called non-communist affidavit. Section 504 made it a crime for union officers to be communists. Both sections had a similar objective—to reduce the threat of political strikes by making it "unpleasant" for communists to be union officers. Section 504 was not inconsistent with § 9(h) as the Civil Rights Act of 1964 was with the law of several states before its passage. To impute to Congress an intention to abate perjury convictions that had been secured while § 9(h) was in force by the passage of § 504 would be to stretch statutory construction to the breaking point.

Also, the court is not unmindful of 1 U.S.C. § 109, which provides that the repeal of a statute shall not be deemed to abate prior convictions without an express statement of legislative intent. Even if the majority in *Hamm* did dilute the need for an expressed intent, as Mr. Justice Black in dissent vigorously contended it had, 379 U.S. 306, 318; see also 79 *Harv. L. Rev.* 132, 133 (1965), the facts before the court do not fall within even the majority's more lax requirement of imputed intent.

Furthermore, unlike the Civil Rights Act of 1964 which changed the status of defendants' conduct which took place prior to its passage, § 504 had no such effect on Bryson's conduct. No case has held § 9(h) unconstitutional, and, moreover, petitioner was convicted under 18 U.S.C. § 1001.

This court concludes that petitioner's reliance on "abatement" is misplaced. Even if his conviction were not final, as it is, it would not abate on the facts of this case. Hence, the doctrine's applicability to final convictions need not be considered [compare *Hamm v. City of Rock Hill,* 379 U.S. 306 (1964), and *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), with *Massey v. United States,* 291 U.S. 608 (1934)].

(3) *Severity of Sentence*

Petitioner argues that his original sentence was cruel and unusual punishment, though admitting that it was authorized by § 1001, the statute under which he was convicted. Bryson has made the same argu-

ment before and it was rejected then as being without merit. *Bryson v. United States,* 265 F. 2d 9 (1959), *cert. denied,* 360 U.S. 919 (1959).

(4) *Standing*

Petitioner contends that § 9(h) was unconstitutional. Respondent strenuously urges that petitioner may not raise the issue, relying on *Dennis v. United States,* 384 U.S. 855, 864-67 (1966). Petitioners in *Dennis* were convicted of conspiring to file false affidavits—the affidavits required by § 9(h). The Court held that the petitioners were without standing to attack a law when convicted of conspiracy to avoid and flout it. The Court said:

> It is the entire conspiracy and not merely the filing of false affidavits, which is the gravamen of the charge. 384 U.S. at 860.
>
> . . .
>
> [P]etitioners are in no position to attack the constitutionality of § 9(h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. . . . [This is a case of] a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction. 384 U.S. at 865.
>
> . . .
>
> The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of

> fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioner's fraud. 384 U.S. at 867.
>
> . . .
>
> Because the claimed invalidity of § 9(h) would be no defense to the crime of conspiracy charged in this indictment, we find it unnecessary to reconsider [*American Communications Ass'n v. Douds,* 339 U.S. 382 (1950)]. . . . *Ibid.*

Though the opinion has been criticized, 80 *Harv. L. Rev.* 213 (1966), it states a rule of standing which this court is duty-bound to follow if the rule applies to the case at bar. Petitioner argues that *Dennis* is inapplicable because Bryson is proceeding by way of collateral attack, whereas *Dennis* was a case of direct attack. Petitioner also argues that even if *Dennis* applies to collateral attacks, Bryson's case is distinguishable from *Dennis.*

The court finds that the case of Hugh Bryson is distinguishable from *Dennis.* In *Dennis,* the Court repeatedly stressed the mental state of the petitioners at the time of the commission of their offense. They were "cynical," "fraudulent," and "deliberate." They faked a resignation from the Communist Party. They knew and believed they were lying as to their *membership* in the Party and that they were defrauding the government. In contrast, Bryson has at all times denied the falsity of his affidavit, while in *Dennis,* only the conspiracy was factually challenged. Indeed,

Bryson was *acquitted* of falsely swearing he was not a *member* of the Party. His conviction, on the *affiliation* count, turned on a word more ambiguous than "member", "affiliation" being as much a conclusion or opinion as a fact. *Cf., American Communications v. Douds,* 339 U.S. 382, 420 (Frankfurter, J., concurring). Petitioner observed that at his trial, the jury requested, and was refused, a dictionary to seek help in defining "affiliation". Even the court of appeals in *Bryson* was unable to precisely define the term. 238 F. 2d at 663.

The Court in *Dennis,* as respondent does here, relied on the cases of *Kay v. United States,* 303 U.S. 1 (1938), and *United States v. Kapp,* 302 U.S. 214 (1937). *Kay* refused to allow a defendant to raise the defense of unconstitutionality after a conviction for lying as to facts which would have entitled him to a certain quantity of government bonds. *Kapp* was also a case of factual misrepresentation. In neither *Kay, Kapp* nor *Dennis* was there a false statement which turned on the construction of a word like "affiliated"; in neither *Kay, Kapp* nor *Dennis* did the defendant deny that he had lied. *Bryson* is a different case.

Furthermore, *Dennis* stressed that petitioners in that case had ignored the Court's holding in *Douds* on the constitutionality of § 9(h). 382 U.S. at 865 n. 11, 867. While it may be said that Bryson did a similar act, at least one member of the *Douds* Court questioned whether the terms "membership" and "affiliation" stood on equal constitutional footing. *Cf.,* 339 U.S. 382, 420 n. 2 and accompanying text (Frankfurter, J., concurring).

If *Dennis* stood simply for the proposition that being convicted of violating a statute when a declaratory judgment could have been sought had the effect of depriving a defendant of standing to attack the statute, a legion of cases would be overruled. *Dennis* stands for no such proposition. What *Dennis* does say is that when the conduct of the defendant is particularly onerous under the circumstances, he may be held to lack standing to challenge a statute.

Standing is not a rigid concept, *cf., Hobson v. Hansen,* 265 F. Supp. 902, 906 (D.D.C. 1967), and authorities there cited. And well it is not. Long ago it was said that "Rigorous law is often rigorous injustice. Terence, *Heauton Timoroumenos,* Act IV, Sc. 4. The facts surrounding Bryson's conviction have been stressed not for the purpose of rewriting the jury's conclusions, but rather to examine the particular legal and equitable posture of the petitioner before this court. All the court is saying is that it finds Bryson's conduct to be less onerous than that in the *Dennis* case—significantly less so and therefore the rule of *Dennis* does not strip Bryson of standing to attack the constitutionality of § 9(h). Petitioner's contention that *Dennis* is inapplicable to collateral attacks need not, therefore, be considered.

(5) *Section 9(h)*

Although § 9(h) was upheld against constitutional attack in *American Communications Ass'n v. Douds,* 339 U.S. 382 (1950), that decision has been undermined, both as to its free speech and bill of attainder

holdings, by more recent pronouncements of the Supreme Court.

Turning first to petitioner's argument that § 9(h) was a bill of attainder. In *United States v. Brown*, 381 U.S. 437 (1965), the Court held unconstitutional § 504, the successor statute to § 9(h). The Court stated its bill of attainder test: A law is unconstitutional as a bill of attainder if it (1) is a legislative act (2) which imposes punishment (3) on an easily ascertainable class (4) without a judicial trial. *Brown* said that *Douds* had misapplied prior cases, 381 U.S. at 457 n 32, 460. It is true that § 9(h) differed from § 504 in that the former permitted an escape from the disability imposed on the union should the officers change their political affiliations. Section 504 provided no escape from criminal sanctions if the officer had been a communist within five years. However, under *Brown's* broad concept of what constitutes "punishment", § 9(h) imposed punishment by depriving union officers of either their jobs or their political beliefs, and consequently amounted to a disability which is punishment. The dissenters in *Brown* were explicit: "[*Douds*] is obviously overruled." 381 U.S. at 464-65.

The Constitution seeks to avoid the evil that inheres when a legislature can punish without a judicial trial offering procedural safeguards and requiring a finding that the specific individual being punished does indeed constitute the danger sought to be prevented. In short, then, bills of attainder are pernicious because legislative classifications may in-

clude persons whose conduct is not a danger which may constitutionally be punished. The assumption of § 9(h) was that all communists were dangerous as union officials. Section 9(h) applied to the most docile communist even though he held no illegal aims. No judicial trial permitted a member or affiliate to show that he was *not* a threat to the national economy. He was automatically swept within the legislative class and punished by administrative sanctions. That is the evil of a bill of attainder. That was the evil of § 9(h). See generally Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification,* 54 *Calif. L. Rev.* 212, 250-51 (1966).

Douds' holding that the oath did not violate the first amendment has similarly been undermined by subsequent cases. Section 9(h) applied to members or persons affiliated with the Communist Party. To question one merely about his membership or affiliation violates the first amendment. *E.g., Keyishian v. Board of Regents,* 385 U.S. 589 (1967); *Elfbrandt v. Russell,* 384 U.S. 11 (1966); *Dombrowski v. Pfister,* 380 U.S. 479 (1965); *Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *Scales v. United States,* 367 U.S. 203 (1961); *Herndon v. Lowry,* 301 U.S. 242 (1937); *DeJong v. Oregon,* 299 U.S. 353 (1937); *Hurwitz v. Directors Guild of America, Inc.,* 364 F. 2d 67, 70-76 (2d Cir. 1966). To state the facts of each case just cited is unnecessary. They all teach the same elemental proposition essential to a free democracy: Membership alone in a political party is constitutionally not a fact which can be legitimately pro-

scribed. More than membership is required. "Specific intent" is required—a specific intent or belief in the illegal purposes of the group. Knowledge of the group's aims is not alone sufficient. Membership or less was deemed enough for a conviction in petitioner's case. 243 F. 2d at 839; 238 F. 2d at 663. The concept now frequently used to describe oaths and statutes which apply regardless of specific intent of the person touched by the law is "overbreadth". That is to say that statutes affecting mere members of political organizations are overbroad in that they punish people who are not a constitutionally punishable danger. Unless a member has an unlawful intent himself, he is not a person who constitutes a clear and present danger to the national security or economy. That is why a statute is said to be overbroad. Guilt by association may not be tolerated in a free society: "[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization . . . or which is not active membership violates constitutional limitations." *Keyishian v. Board of Regents,* 385 U.S. 589, 608 (1967).

(6) *Relief and the Relation Between Section 1001 and Section 9(h)*

Petitioner asserts that if § 9(h) falls as a bill of attainder or as a statute violating his first amendment rights, the conviction under § 1001 must also fall. He contends that § 9(h) expressly referred to § 1001 and that the latter is only the procedural means of

enforcing § 9(h). Hence, if § 9(h) is void, there is nothing on which § 1001 could operate and the trial court was consequently without jurisdiction to impose any punishment. Respondent argues that even if § 9(h) was unconstitutional, § 1001 is not and that there is no right to perjure oneself.

Section 1001, the statute under which Bryson was convicted, proscribed false statements "in any matter within the jurisdiction of any department or agency of the United States. . . ." As that phrase has been consistently construed, petitioner committed no offense because § 9(h) was unconstitutional. Hence, no government agency was authorized to inquire into petitioner's political beliefs, membership or affiliation. Only the "authorized functions" of government were intended to be protected, *United States v. Gilliland,* 312 U.S. 86, 93 (1941). The Ninth Circuit has similarly held: "A false statement is submitted in a matter within the jurisdiction of a department or agency within the meaning of 18 U.S.C.A. § 1001 if it relates to a matter as to which the Department had the power to act." *Ogden v. United States,* 303 F. 2d 724, 743 (9th Cir. 1962), and in *Pitts v. United States,* 263 F. 2d 353, 358 (9th Cir. 1959), the court said: "It is clear that the congressional intent in using the broad language found in 18 U.S.C. § 1001 . . . was to protect the authorized functions of government departments and agencies. . . ." Cases reaching the conclusion that the non-communist affidavits were within the jurisdiction of the United States are inapposite, as they were decided prior to

United States v. Brown, 381 U.S. 437 (1965); *Elfbrandt v. Russell,* 384 U.S. 11 (1966); and *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), and assumed the constitutionality of § 9(h).

Even if the inquiry was within the jurisdiction of the government, petitioner contends that the entire statutory scheme cannot constitutionally be applied if § 9(h) is unconstitutional. The evils of such a scheme were discussed by the Supreme Court in *Elfbrandt v. Russell,* 384 U.S. 11, 18 (1965): "[E]mployees of character and integrity may well forego their calling rather than risk prosecution for perjury or compromise their commitment to intellectual and political freedom." The entire scheme of oath and criminal punishment constituted the evil. The dissenters even claimed that the majority had invalidated only the criminal penalty. 384 U.S. at 23. In *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), it was made clear that more than the criminal penalty was unconstitutional—the inquiry as to political membership alone constituted an unconstitutional chilling effect on speech when specific intent was not required.

It is no answer to say that because Bryson was not deterred from perjury or yielding his beliefs that he may not contest the statutory scheme. It is well settled doctrine that where first amendment or political rights are involved, hypothetical applications of a statute may be raised and may be determinative. *E.g., Aptheker v. Secretary of State,* 378 U.S. 500 (1964); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963);

Thornhill v. Alabama, 310 U.S. 88 (1940). Nor can it be said that merely because the criminal penalty is in a separate statute from the oath requirement that the perjury conviction must stand. That would be to exalt form over substance—a luxury in which a court must not indulge when basic constitutional rights are at stake. Section 1001 is expressly invoked by § 9(h). The criminal penalty could just as easily have been incorporated into § 9(h) itself. There is no intent evident that Congress intended § 1001 to be applicable if § 9(h) was declared unconstitutional. *Cf.,* 29 U.S.C. § 144. Since this court holds § 9(h) to have been unconstitutional, its invocation of § 1001 was also without effect.

The foregoing constitutes the court's findings of fact and conclusions of law.

Therefore, It Is Hereby Ordered that petitioner's conviction and sentence be, and hereby are, set aside. It Is Further Ordered that he be released from parole and its attendant terms and conditions and that he be relieved of the remaining portion of his fine.

Dated, November 6, 1967.

Alfonso J. Zirpoli
United States District Judge

Filed November 6, 1967,
Clerk of the U. S. District
Court, San Francisco.

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Hugh Bryson, Appellee.	No. 22,474

[November 5, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: MERRILL, MADDEN and HUFSTEDLER, Circuit Judges

PER CURIAM:

The Government appeals from an order of the District Court granting appellee's motion to vacate and set aside a judgment of conviction of violation of 18 U.S.C.A. § 1001, the general federal perjury statute. A jury found appellee, Bryson, guilty of filing an affidavit with the National Labor Relations Board falsely alleging that he was not affiliated with the Communist Party. Bryson filed the affidavit with the Board pursuant to former § 9(h) of the Labor Management Relations Act, 1947, 29 U.S.C.A. §§ 141, 159(h). Section 9(h) prevented a union from using services of the Board unless and until each of the union's officers had filed his affidavit that he was

neither a member of nor affiliated with the Communist Party. During his trial Bryson attacked the constitutionality of § 9(h). The attack failed, and his conviction was affirmed on appeal. *Bryson v. United States,* 9 Cir., 1956, 238 F.2d 657, rehearing denied, 1957, 243 F.2d 837, cert. denied, 1957, 355 U.S. 817. The constitutionality of § 9(h) had been specifically upheld in *American Communication Ass'n v. Douds,* 1950, 339 U.S. 382.

In obtaining the order from which this appeal is taken, Bryson successfully contended in the District Court that his conviction should be vacated because § 9(h) was unconstitutional. We hold that Bryson had no standing to attack the constitutionality of § 9(h). The holding is compelled by *Dennis v. United States,* 1966, 384 U.S. 855, because there are no significant differences between *Bryson* and *Dennis.* Bryson's inability to reach the constitutional issue defeats his attack on the validity of the conviction and renders unnecessary our discussion of the remaining contentions of the parties.

The order is reversed.

United States Court of Appeals
for the Ninth Circuit

United States of America, Appellant, vs. Hugh Bryson, Appellee.	No. 22,474

JUDGMENT

Appeal from the United States District Court
for the Northern District of California

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered November 5, 1968.

Supreme Court of the United States

No. 934 --- , *October Term, 19* 68

Hugh Bryson,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed February 24 ---------- , 1969.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ---------- Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.